

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES R. SCHULTZ,

Petitioner,

v.

PAM WALLACE, Warden,
Stanley Correctional Institution; and
P. NICHOLS, Chippewa Valley
Treatment Facility,

Respondents.

ORDER

05-C-751-C

In an order entered on January 5, 2006, I denied petitioner's request for leave to proceed in forma pauperis in this civil action after concluding that he had struck out under the three strikes provision of the 1996 Prison Litigation Reform Act, 28 U.S.C. § 1915(g). Later, on January 17, 2006, petitioner filed a motion for reconsideration pursuant to Fed. R. Civ. P. 59, which I denied on January 26, 2006. On February 7, 2006, petitioner filed a notice of appeal. In an order dated February 8, I construed petitioner's notice of appeal to include a request for leave to proceed on appeal in forma pauperis. I denied that request for the same reason I had denied his request for leave to proceed in this court: he has struck

out and cannot proceed in forma pauperis in a lawsuit or appeal in a suit against government officials so long as he is a prisoner unless he qualifies for the exception to § 1915(g). I noted that even though petitioner did not qualify for pauper status on appeal, the Prison Litigation Reform Act required him to pay the \$255 fee either immediately if he has the money in his prison account or in monthly installments pursuant to 28 U.S.C. § 1915(b)(2) if he does not.

Now petitioner has filed a letter dated February 16, 2006, which I construe as a motion for reconsideration of the February 8 order and a request to withdraw his notice of appeal. Petitioner's motion must be denied. If petitioner disagrees with this court's conclusion that he does not qualify to proceed in forma pauperis, the proper step for him to take is to ask the court of appeals for leave to proceed on appeal in forma pauperis as set out in Fed. R. App. P. 24(a)(5). Moreover, if petitioner wishes to withdraw his appeal, he should notify the court of appeals, not this court.

Fed. R. App. P. 24(a)(5) states

A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice [that his request for leave to proceed has been denied in the district court]. The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

In his motion, petitioner complains about the harsh financial penalty for filing a

notice of appeal. Petitioner notes that he has a learning disability and “doesn’t know how this got so complicated, or what I ever did to get you so mad at me.” He states that because there are so few jobs in the prisons, he is receiving unassigned pay of only \$.05 an hour. At that rate of earning, it will take him over five years just to pay the fee for filing his appeal. He seems to think that if he dismisses his appeal voluntarily, he will not owe the fee.

I am sympathetic to petitioner’s situation, but Congress has determined that he must pay the fees for filing his complaint and appeal. Congress has not made any exception for prisoners who lack the mental capacity to understand the cost of bringing their claims in federal court. When I denied petitioner leave to proceed and when I told petitioner that he must pay for filing a notice of appeal, I did not do so because I was angry with him. I did it because I have to follow the laws that Congress passes.

ORDER

IT IS ORDERED that petitioner’s motion for reconsideration of the order entered

herein on February 8, 2006, denying him leave to proceed in forma pauperis on appeal is DENIED.

Entered this 28th day of February, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge